

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE: FACEBOOK, INC. CONSUMER
PRIVACY USER PROFILE LITIGATION

Case No. [18-md-02843-VC](#) (JSC)

**ORDER RE: FACEBOOK’S APPEAL
OF SPECIAL MASTER’S ORDER
REGARDING ADI MATERIALS**

Re: Dkt. No. 778

Now pending before the Court is Facebook’s appeal of the Special Master’s order regarding production of ADI materials. (Dkt. No. 778; *see also* Dkt. No. 709 (setting forth the procedures for appeal of Special Master discovery orders).) After carefully considering the appellate record (Dkt. No. 777-3), reviewing the Special Master’s order *de novo*, *see* Fed. R. Civ. P. 53(f)(3), and having heard orally from the parties on January 11, 2022, the Court rules as set forth below.

1. The Court affirms the Special Master’s findings that (a) “‘Judge Corley’s [ADI] order does not exclude non-attorney internal Facebook communications with [Facebook’s consulting experts] . . . from the scope of ADI documents to be produced’” and (b) that “‘additional information regarding the relevance of [internal ADI] communications is necessary to determine whether such communications should be produced.’” (Dkt. No. 778 at 2 (quoting Dkt. No. 776 at 4-5).)

The Special Master’s order is exactly what this Court’s ADI Order contemplated. Facebook took the position that *all* ADI-related material was privileged from production as

attorney work-product or attorney-client privileged. (Dkt. No. 777-3 at 264; Dkt. No. 711 at 1.)¹ While Facebook later agreed to produce some underlying data, it maintained that all “reports, audits and interviews created or conducted by non-attorneys” are privileged. (Dkt. No. 777-3 at 284; Dkt. No. 736 at 1.) The Court’s ADI Order adjudicated that broad claim of privilege and found that because the ADI played a dual purpose, and that Facebook would have conducted the investigation even in the absence of anticipated litigation, the attorney work-product privilege did not protect all material. The Court therefore ordered:

On or before September 21, 2021, Facebook shall produce the background and technical reports, audits and developer interviews of the six exemplar apps chosen by the parties as Facebook has offered no special reasons why those particular documents are privileged other than what has been addressed. *The parties shall work with the Special Master regarding production of additional materials consistent with the guidance offered by this Order.*

(Dkt. No. 777-3 at 289; Dkt. No. 736 at 7) (emphasis added).) The guidance offered by the Court’s ADI Order was that ADI-related documents are not protected by the work-product or attorney-client privilege in the absence of specific showings of actual work-product, such as attorney edits, or the giving or seeking of legal advice. The Special Master’s order is consistent with that guidance.

The Court did not rule that non-attorney communications with the consultants are not discoverable. To the contrary, the Court’s ruling rejecting Facebook’s broad attorney work-product claim means that such communications are not privileged absent some other special showing as to specific communications. The hearing statements by the Court and Plaintiffs which Facebook relies upon were in the context of attempting to narrow the issues to determine if the parties could agree on what ADI materials to produce. Unfortunately, they could not. As a result, the Court ruled on the privilege claim. Again, the Court did not rule that communications are not discoverable and never need be produced.

Facebook’s lament that some of the communications may not be relevant is puzzling. The Special Master specifically stated that he required more information to determine relevance and

¹ Record citations are to material in the Electronic Case File (“ECF”); pinpoint citations are to the ECF-generated page numbers at the top of the documents.

1 “whether such communications should be produced.” (Dkt. No. 777-3 at 9; Dkt. No. 776 at 5.)
2 Facebook chose to appeal this common-sense approach. Its appeal fails.

3 2. The Court affirms the Special Master’s finding that “all memoranda prepared by
4 [Facebook’s consulting experts] . . . are within the scope of Judge Corley’s order.” (Dkt. No. 778
5 at 2 (quoting Dkt. No. 776 at 4).) Facebook produced such memoranda for the six exemplar apps,
6 therefore confirming that they are within the category of documents the Court specifically ordered
7 produced as not privileged. As the Court held they are not privileged, the Special Master ordered
8 them produced. Review of Facebook’s briefing and the actual memoranda themselves does not
9 reveal any reason to find they are privileged from production.

10 3. The Special Master’s finding that “‘all audits’ . . . ‘are within the scope of Judge
11 Corley’s order’” (Dkt. No. 778 at 2 (quoting Dkt. No. 776 at 4)) is affirmed. The Court
12 specifically held that the ADI audits conducted by non-attorneys are not protected attorney work-
13 product and are not protected by the attorney-client privilege. (Dkt. No. 736 at 6.) Thus, neither
14 privilege precludes the Special Master from ordering their production and Facebook does not
15 argue, as it cannot, that the Court earlier held that additional audits are not discoverable. Rather,
16 the Court ordered the non-privileged material related to the six exemplar apps be produced as part
17 of the iterative ongoing discovery process. The point of the exemplar production was to identify if
18 particular types of documents are relevant and proportional, not to forever limit Plaintiffs to
19 evidence from just those six exemplar apps.

20 Facebook’s contention that the Special Master’s order includes the production of attorney
21 audits (Dkt. No. 778 at 2) is wrong. That the Special Master did not order the production of
22 attorney audits is evidenced by Facebook’s failure in its Motion for Reconsideration to argue that
23 he had ordered the production of attorney audits. (Dkt. No. 777-3 at 10-28.) Facebook did argue
24 to the Special Master that his order was unclear as to whether he was ordering the production of
25 communications over which Facebook claims privilege (apart from its earlier rejected privilege
26 claim). (*Id.* at 28.) The Special Master responded to the Motion for Reconsideration by ordering
27 Facebook to provide the Special Master with the ADI-related communications pertaining to the six
28 exemplar apps for the Special Master’s *in camera* review. (Dkt. No. 776 at 5.) In other words, the

1 Special Master is specifically considering Facebook’s additional privilege contentions.

2 4. The Court declines Facebook’s oral argument plea that the Court direct the Special
3 Master to consider proportionality and discovery limits. In response to Facebook’s Motion for
4 Reconsideration argument that producing ADI communications would be too burdensome and that
5 much of the discovery would be irrelevant, the Special Master found that “additional information
6 regarding the relevance of such communications is necessary to determine whether such
7 communications should be produced.” (Dkt. No. 777-3 at 9.) Determining relevance is a key
8 component of determining proportionality.

9 This Order disposes of Docket No. 778.

10 **IT IS SO ORDERED.**

11 Dated: January 12, 2022

12 
13 JACQUELINE SCOTT CORLEY
14 United States Magistrate Judge
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